HLM Sdn Bhd v UDA Land (South) Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–805 OF 2005
SUPANG LIAN JC
29 JANUARY 2010

Contract — Damages — Liquidated agreed damages ('LAD') — Housing scheme — Plaintiff to build houses for housing scheme undertaken by defendant — Whether project completed within time — Whether LAD imposed on plaintiff after project completed within time — Whether certificate of non-completion issued

Contract — Interpretation — Written contract — Question of construction of terms — Approach to — Whether words unambiguous and clear — Whether plain meaning of words used must be given effect

The defendant employed the plaintiff as the contractor to build some houses for a housing scheme undertaken by the defendant at Bandar Uda Utama in Johor Bahru. The payment of the contract sum of RM17,113,195.72 was made payable in accordance with the interim certificate issued by the superintending officer ('SO'). It was agreed that except for RM668,000, the defendant had paid to the plaintiff the full amount of the contract sum. The defendant did not pay the sum because the SO by two of the interim payment certificates, namely Nos 23 and 24, had certified that the said sum was to be deducted from the monies due to the plaintiff being liquidated agreed damages ('LAD') for the period between 14 April 2004 to 27 September 2004. Aggrieved by the said deduction, the plaintiff brought the present action to recover, inter alia, the said sum. The plaintiff contended that as they had achieved practical completion of the project on 13 April 2004, there was no question of late delivery on its part. As the plaintiff had not breached the contract, the imposition of LAD by the SO could not be justified and the deduction by the defendant was harsh and unconscionable. The issue at hand was whether the provisions of the contract allowed for the imposition of LAD.

Held, allowing the plaintiff's claim with costs:

(1) The plaintiff was not in breach of cl 40(a) as the project was completed within the extended time given under cl 43. In any case, the SO had not issued any certificate of non-completion as contemplated under cl 40(a). That being the case, the SO had no basis whatsoever under the provisions of the contract to impose LAD on the plaintiff and more so when it was imposed, as in this case, to run after the date the plaintiff had completed the project within time (see para 23).

(2) Upon a proper construction of the contract, the deduction of the sum of RM668,000 for LAD was without basis and therefore unlawful. The imposition of the LAD being unlawful, the deduction in the interim payment certificates Nos 23 and 24 of the sum of RM668,000 from the contract sum due to the plaintiff was wrongly made (see para 26).

[Bahasa Malaysia summary

Defendan melantik plaintif sebagai kontraktor untuk membina beberapa rumah dalam satu skim perumahan yang dijalankan oleh defendan di Bandar Uda Utama di Johor Bahru. Pembayaran jumlah kontrak RM17,113,195.72 telah dibuat sejajar dengan sijil interim yang dikeluarkan oleh pegawai yang menjaga ('SO'). Ianya telah dipersetujui bahawa kecuali bagi wang sejumlah RM668,000, defendan telah membayar kepada plaintif amaun sepenuhnya terhadap jumlah kontrak tersebut. Defendan tidak membayar jumlah wang tersebut kerana SO melalui dua sijil bayaran interim, iaitu No 23 dan 24, telah mengesahkan bahawa jumlah tersebut akan ditolak dari wang yang terhutang kepada plaintif bagi jumlah ganti rugi tertentu yang dipersetujui ('LAD') untuk tempoh antara 14 April 2004 hingga 27 September 2004. Terkilan dengan tolakan tersebut, plaintif memfailkan tindakan ini menuntut, antara lain, jumlah tersebut. Plaintif menyatakan bahawa memandangkan mereka telah mencapai penyiapan praktikal projek itu pada 13 April 2004, tidak ada persoalan serahan lewat oleh pihaknya. Oleh kerana plaintif tidak memungkiri kontrak, pengenaan LAD oleh SO tidak boleh dijustifikasikan dan tolakan oleh defendan adalah keras dan tidak berpatutan. Isu sekarang adalah sama ada peruntukan-peruntukan kontrak membenarkan untuk pengenaan LAD.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Plaintif tidak mengingkari klausa 40(a) kerana projek itu telah disiapkan dalam masa lanjutan yang diberikan di bawah klausa 43. Walau bagaimanapun, SO tidak mengeluarkan apa-apa sijil gagal menyiapkan kerja seperti diperuntukkan klausa 40(a). Oleh itu, SO tidak mempunyai apa-apa asas sekalipun di bawah peruntukan-peruntukan kontrak untuk mengenakan LAD ke atas plaintif dan lebih-lebih lagi apabila ia telah dikenakan, seperti dalam kes ini, bermula selepas tarikh plaintif telah menyiapkan projek itu dalam masa diperuntukkan (lihat perenggan 23).

(2) Atas pentafsiran sebenar kontrak tersebut, tolakan jumlah RM668,000 untuk LAD adalah tanpa asas dan oleh itu menyalahi undang-undang. Oleh kerana pengenaan LAD adalah menyalahi undang-undang, tolakan dalam sijil-sijil bayaran interim No 23 dan 24 bagi jumlah RM668,000 dari jumlah kontrak yang tertunggak kepada plaintif dibuat secara salah (lihat perenggan 26).]

Notes

For cases on damages in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3350–3538.

For cases on interpretation in general, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4406–4409.

Cases referred to

Central Bank of India Ltd Amritsar, The v The Hartford Fire Insurance Co Ltd AIR 1965 SC 1288 (refd)

Jiwa Property Sdn Bhd v Ng Moi Sim [2009] MLJU 437, HC (refd)

Malaysia Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Berhad & Ors [2008] 2 MLJ 256; [2008] 1 AMR 672, CA (refd)

Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577; [1995] 1 AMR 874, FC (refd)

Shuler (L) AG v Wickman Machine Tool Sales Ltd [1974] AC 235, HL (refd)

Vasuge (Sarojah Sukumar and S Balasekaran with her) (Bala & Co) for the plaintiff.

Reginald Vallipuram (Reginald Vallipuram & Co) for the defendant.

Supang Lian JC:

INTRODUCTION

[1] By an agreement in writing dated 4 June 2002 ('the agreement') the defendant as developer employed the plaintiff as the contractor to build some houses for a housing scheme undertaken by the defendant at Bandar Uda Utama, Tampoi in Johor Bahru. The houses to be built were:

(a) Two units of single storey show house with attic and two units of single storey show house;

(b) 17 units of single storey terrace houses with attic, and;

(c) 202 units of single storey terrace houses.

The total value of the contract taking into consideration additions and omissions was RM17,113,195.72. It is a term of the contract that the payment of the contract sum was to be made in accordance with the interim certificate to be issued by the superintending officer ('SO') who in this case was Messrs A Karim Akitek. The architect had accordingly issued 24 interim certificates for this purpose. It is common ground that the plaintiff achieved practical completion of the project on 13 April 2004 whereas Majlis Daerah Johor Bahru Tengah issued the Certificate of Fitness for Occupation ('CFO') on 27 September 2004. Further, it is agreed that except for RM668,000, the defendant has paid to the plaintiff the full amount of the contract sum. The plaintiff did not pay the RM668,000 because the SO by two of the interim payment certificates namely Nos 23 and 24 had certified that this sum is to be deducted from the monies due to the plaintiff being liquidated agreed damages ('LAD') due to the defendant for the period 14 April 2004 to 27 September

2004 at the rate of RM4,000 per day. The plaintiff is aggrieved by the deduction of RM668,000 and has brought the present action to recover, inter alia, the said sum.

QUESTION OF LAW UNDER O 14A OF THE RULES OF THE HIGH COURT 1980

[2] When the case came up for trial, the parties made mutual oral application to the court to determine a question of law on the construction of the written agreement of 4 June 2002. The parties said the question of law is suitable for determination without a full trial of the action. Besides, such determination would finally determine the entire matter or claim before the court. I agreed to the course that they had proposed and asked them to state the question for determination. As well, the parties were directed to come up with a statement of agreed facts to lay the factual matrix upon which the question of law can be determined. The parties have come up with both. They have couched the question for determination in the following terms:

> Whether upon a proper construction of the Contract (at) page(s) 1 to 90 of Encl. B the deduction of the sum of RM 668,000.00 being LAD for period 14/4/2004 to 27/9/2004 in Interim Certificate No. 23 and 24 is lawful.

The Interim Certificate No 23 is exhibited at p 148 of bundle B whereas Interim Certificate No 24 is at pp 1–2 of bundle E. Enclosure B referred to by the parties is actually marked bundle B and comprises documents that have been agreed and admitted by the parties. Bundle E as well comprises documents agreed and admitted by the parties.

THE CASE FOR THE DEFENDANT

[3] The issue at hand is whether upon a construction of the agreement the imposition by the SO of LAD to the amount of RM668,000 for the period 14 April 2004 to 27 September 2004 is lawful. Mr Reginald Vallipuram, counsel for the defendant, maintains that the SO was right in imposing such LAD for the reasons as follows. For a start one must look to the provisions of the contract with regard the date of completion of the works. Clause 39 of the conditions of contract (see p 39 of bundle B) provides that the plaintiff shall complete the whole of the works by the 'Date of Completion'. Clause 39 reads thus:

> Completion of Works
>
> (a) Subject to any requirements as to the completion of any section or part of the Works under Clauses 38(c) and 41, completion of the whole of the Works, the Contractor shall complete the whole of the Works on or before the 'Date of Completion' stated in the Appendix or such extended time as may be allowed under clause 43 hereof.

Now, cl 39 of the conditions of contract, above, speaks of the date for completion as 'stated in the appendix or such extended time as may be allowed under cl 43 hereof'. The appendix to the conditions of contract referred to is produced at p 50 of bundle B and by its cl 39 the 'Date for Completion' for the whole of the works is stated to be 19 March 2003. Hence, the original date of completion of the project was supposed to be 19 March 2003.

[4] Counsel for the defendant next draws attention to the provisions in the contract pertaining to the imposition of LAD. The key provision allowing for the imposition of LAD counsel says is cl 41 of the conditions of contract which is to be read together with cl 41 of the appendix to the conditions of contract. Clause 41 of the conditions of contract (see p 39 of bundle B) reads thus:

> Where different completion dates for different sections or parts of the Works are stated and identified in the Appendix … and different and separate Liquidated and Ascertained Damages are provided for each section or part of the Works, the provisions of this Contract in regard to the Certificate of Practical Completion, Delay and Extension of Time, Liquidated and Ascertained Damages for delay, … shall, in the absence of any express provision to the contrary elsewhere in the Contract Documents apply mutatis mutandis as if each such section or part was the subject of a separate and distinct contract between the Government and the Contractor.

Clause 41 of the appendix to the conditions of contract provides as follows:

41. Sectional Completion

Identification of Sections or parts	Date for Possession [Clause 38 (c)]	Date of Completion	Liquidated and Ascertained Damages
Balance of Works; 17 units of single storey terrace house (with attic); 202 units of single storey terrace house	20.9.2001	19.3.2003	RM4,000.00 per day

It is the case for the defendant that by virtue of cl 41 of the conditions of contract read with cl 41 of the appendix to the conditions of contract (see p 50 of bundle B), the plaintiff is liable to pay LAD at the rate of RM4,000 per day after 19 March 2003, which is the date of completion.

[5] However, as we have seen from the provisions of cl 39(a) of the conditions of contract, above, there is provision under cl 43 thereof for the SO to give extension of time for completion of the works. Further, and this is common ground between the parties, whenever the SO grants an extension under cl 43 no LAD was to be imposed. Apparently, and this again is common ground, on the application of the plaintiff, the SO had granted three extensions of the date for completion. The final extension date granted was 13 April 2004 and it is not in dispute that the plaintiff in fact reached practical completion of the whole project on that given date. This would bring the plaintiff within the extended time of completion given by the SO.

[6] Now, whenever the whole works have reached practical completion, pursuant to the provisions of cl 39(b) of the conditions of contract (see p 39 of bundle B) the SO was to certify the date of such completion. One would have thought that it would have to follow that the date of completion is the date of practical completion, but it is not as straightforward as that. Clause 39(b) provides as follows:

> (b) When the whole of the Works have reached practical completion according to the provisions of this Contract and to the satisfaction of the S.O. the date of such completion shall be certified by him and such date shall be the date of the commencement of the Defects-Liability Period as provided in Clause 45 hereof. The certificate issued under this sub-clause shall be referred to as the 'Certificate of Practical Completion'.

Indeed the SO had issued his certificate of practical completion pursuant to cl 39(b) above. It is at p 153 of bundle B and an English translation of it reads something like this (I adopt from the submission of the defendant):

> In accordance with Clause 39(b) of the Conditions of Contract and subject to the completion of any works not completed and rectification of any defects, imperfection, shrinkage or any other damage as required under Clause 45 of the Conditions of Contract and which may become apparent during the defect liability period it is hereby accordingly certified that the entire works as stated above has been completed satisfactorily on 27 September 2004 and take over possession on 27 September 2004 and therefore the defect liability period for the entire works commences on 27 September 2004 and ends on 26 September, 2006.

[7] It can be seen from the certificate of the SO that he had certified the date of completion as 27 September 2004 and not 13 April 2004. From whence does the date 27 September 2004 come from? Following from the contentions of counsel for the defendant, it appears that the date 27 September 2004 was arrived at from a construction of and application of yet another clause, which is cl 39 of the Prelims & Gen of the Contract. That cl 39 of the Prelims & Gen is produced at p 88 of bundle B and it reads as follows:

Completion of Works

The date of completion referred to in the Appendix to the condition of contract shall also be the date for approval of Certificate of Fitness for Occupation to be issued by Majlis Daerah Johor Bahru Tengah.

[8] The contention of counsel for the defendant is that although the date for completion given in cl 39 of the appendix to the conditions of contract is 19 March 2003 (later extended by the SO to 13 April 2004), by virtue of the stipulations of cl 39 of the Prelims & Gen, above, it is to be construed that the date of completion referred to in the appendix is the date of approval of the Certificate of Fitness for Occupation ('CFO') by Majlis Daerah Johor Bahru Tengah. It is the case for the defendant that in light of the agreement between the parties that the date of approval of the CFO by the Majlis Daerah Johor Bahru Tengah is 27 September 2004, that date should be taken to be the date of the completion of the works by the plaintiff.

[9] Now to the matter that is the cause of the disagreement between the parties. As earlier stated, payment of work done by the plaintiff under the contract was to be paid in accordance with the interim payment certificate to be issued by the Messrs A Karim Akitek, also referred to as the SO. Clause 47 of the conditions of contract (see p 42 of bundle B) provides that the defendant shall within 30 days of the issuance of such certificate pay the amount certified as due to the plaintiff. The SO issued 24 such certificates but in the 23rd certificate (interim payment certificate No 23), the SO made the deduction for LAD. The SO repeated the deduction in the next interim payment certificate No 24. I note that interim payment certificate No 23 is dated February 2005 whereas interim payment certificate No 24 is dated 30 September 2005. Hence, they were issued after the issuance of the CFO on 27 September 2004. As we know, the deduction that the SO made in the two certificates is for LAD for the period 14 March 2004 to 27 September 2004 in the sum of RM668,000 at the rate of RM4,000 per day. To state the obvious this is the period from the date of completion of the contract to the date of issuance of the CFO. As the plaintiff had completed the works by the date specified for completion, the defendant would be hard pressed to explain the imposition of LAD by the SO.

[10] Mr Reginald Vallipuram for the defendant proffered justification as follows. We know that by cl 39(a) of the conditions of contract the plaintiff was required to complete the whole of the works on or before the 'date of completion stated in the appendix' or such extended time as may be allowed by the SO under cl 43. Counsel lays emphasis on the words 'date of completion stated in the appendix'. These words are to be construed to mean the date of completion as stated in the appendix. The date of completion stated in the appendix is 19 March 2003 but extended to 13 April 2004. However,

according to counsel for the defendant, the date 13 April 2004 is not to be taken as the date of completion. This is because of the provisions of cl 39 of the Preliminaries & General of the Contract, reproduced above, which gives a different definition, as it were, of the date of completion referred to in the appendix. The said cl 39 of the Prelim & Gen states that the date of completion referred to in the appendix to the condition of contract shall also be the date for approval of Certificate of Fitness for Occupation to be issued by Majlis Daerah Johor Bahru Tengah. Counsel says that cl 39 of the Prelim & Gen is a specific provision giving meaning to the words 'date of completion' as referred to in the appendix and is therefore applicable. According to counsel, the date of completion envisaged by cl 39 of the Prelim & Gen includes the issuance of the CFO, in other words, completion includes the CFO. He contends that in this case what happened was that the plaintiff physically completed the work on 13 April 2004 but this is short of the completion contemplated by virtue of the Prelim and Gen, which includes the issuance of CFO. According to counsel, that was precisely why the architect imposed LAD on the plaintiff for the period after 13 April 2004 to 27 September 2004.

THE CASE FOR THE PLAINTIFF

[11] Naturally, it is the case for the plaintiff that the SO was wrong in making the deduction. Miss Vasuge, counsel for the plaintiff, gave the following reasons in support of the stance of the plaintiff. Firstly, the plaintiff had completed the project within the time stipulated and there was no question of delay or late delivery. Counsel says that by the statement of agreed facts, the defendant concedes that the plaintiff had achieved practical completion of the project on 13 April 2004. In addition, the plaintiff has complied strictly with the terms and conditions stipulated in the agreement, in particular, the time-frame or extended time-frame in which to complete the project. With reference to cl 39 of the Prelim & Gen, counsel for the plaintiff submits that the date of practical completion of 13 April 2004 is the date that the contractors (the plaintiff) had completed the whole project and had passed the project to the developers (defendant) to enable the latter to apply for CFO. Counsel argued that it is not practical for a reasonable man to apply for CFO on the date of the practical completion and to expect to obtain the CFO from the Majlis Daerah on the same day itself. As such, counsel says, it defies logic and common sense to reckon 27 September 2004 as the date of completion of the project. Given that the plaintiff has achieved practical completion on 13 April 2004, thus completing the project within the time stipulated in the contract, there is no question of late delivery on its part. For that reason, the plaintiff has not breached the contract. In as much as there never has been a breach of contract, the imposition of LAD by the SO cannot be justified and the deduction by the defendant was harsh and unconscionable.

[12] Secondly, the issuance of the CFO is not within the control of the plaintiff but is the exclusive province of the local authority responsible for issuing such certificates. According to counsel for the plaintiff, it is common knowledge and one that this court should take judicial notice, that the local authority process normally takes six months to one year to issue the CFO. Thus, despite the plaintiff having achieved practical completion of the project on 13 April 2004, the CFO was only issued on 27 September 2004 by the relevant local authority. What is more, given that the delay is attributable to the local authority, the plaintiff is blameless and is the innocent party. For that reason, it was unfair and unreasonable on the part of the defendant to have claimed LAD from 14 April 2004 to 27 September 2004.

[13] Finally, the plaintiff contends that it is common knowledge, and one that the court should yet again take judicial notice, that the responsibility of applying for the CFO lies with the developer (in the present case, the defendant). Counsel for the plaintiff referred to the case of *Jiwa Property Sdn Bhd v Ng Moi Sim* [2009] MLJU 437 (Civil Appeal No MT4 12–43 of 2007). In the High Court in Malaya at Johor Bahru, unreported, at p 7 where Tuan Kamardin bin Hashim JC had the occasion to say:

> Walau bagaimanapun, pemaju hendaklah seterusnya mengemukakan permohonan untuk mendapatkan CFO daripada pihak berkuasa tempatan yang berkenaan.

Counsel for the plaintiff argues that it is the defendant's responsibility and duty to explain to the court the undue delay in issuing the CFO. According to counsel, in law there is no reciprocal obligation imposed on the plaintiff to apply for the CFO. In the absence of such explanation from the defendant, the one reasonable inference is that there was undue delay on the part of the defendant in making the application to the appropriate authorities for the issuance of the CFO.

[14] Counsel for the plaintiff concluded by saying that following from the facts and circumstances of this case, it is clear that the defendant did not come to court with clean hands but hands besmirched 'by raising untenable issues without any basis to deprive the plaintiff from pursuing the just and lawful claim against the defendant'. According to counsel for the plaintiff, the defendant had acted mala fide.

HANDS BESMIRCHED?

[15] With regard the final statement from the plaintiff suggesting that the defendant has come to court with besmirched hands, I find it rather anomalous. I would have thought that accusations such as this are normally directed at the party, usually the plaintiff, who has begun the action. This is because it is the plaintiff that has come to court to seek redress and he who seeks

redress from the courts must come with clean hands. The defendant on the other hand is summoned before the court to defend itself against the claim of the plaintiff. It is not the party seeking redress. It had a counterclaim but the parties have agreed that has been settled and it was struck off. It therefore does not make sense for the plaintiff to require that the defendant come to court with clean hands.

PRINCIPLES OF CONSTRUCTION

[16] To the matter at hand: the court is called upon to construe the contract that the parties have entered into to determine whether the imposition of LAD for the period 14 March 2004 to 27 September 2004 is allowed or as the parties would put it, whether it is lawful. As the case turns on the construction to be given to the contract it behoves one to keep in mind some salient principles with regard to construction of any written contract. As has been said before, for the purposes of construction of contracts, the intention of the parties is the meaning of the words they have used; what they mean to say cannot be equated with the meaning of what they said (see *Malaysia Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors* [2008] 2 MLJ 256; [2008] 1 AMR 672 at para [24]; *Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577 at p 593; [1995] 1 AMR 874 at p 891). The point is succinctly put by Lord Simon of Glaisdale in *Shuler (L) Ag v Wickman Machine Tool Sales Ltd* [1974] AC 235 in approving the following passage in *Norton on Deeds*, (2nd Ed), 1928 p 50:

> … the question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?' … it being a presumption *juris et de jure* … that the parties intended to say that which they have said.

[17] In *Malaysia Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Berhad & Ors* at para [25] His Lordship Suriyadi Halim Omar JCA approved of another well established principle spoken of by Kim Lewinson in *The Interpretation of Contracts*, Sweet & Maxwell 1989. It is this: when interpreting the meaning of the words used in a contract the words should be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy. Elsewhere it has been said in amplification that the court must give effect to the plain meaning of the words, no matter how distasteful the result may be (*The Central Bank of India Ltd Amritsar v The Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288).

Clause 40(a) and (b) of the Conditions of Contract

[18] With those principles in mind, let us bring into focus the issue at hand,

which is whether the provisions of the contract allow for the imposition of LAD for the period 14 March 2004 to 27 September 2004. That being the issue, the thing to do is to go to the contract, look for the provisions relating to LAD and its imposition and interpret the meaning of what the parties have said by the plain meaning of the words used. Meaning no discourtesy or disrespect to learned counsel for the defendant who has with much industry taken us through several provisions of the contract, in my opinion, there is only one clause in the contract that sets out the conditions under which LAD may be imposed. It is cl 40 of the conditions of contract specifically sub-cl (a) (see p 39 of bundle B). Clause 40(a) reads thus:

> If the contractor fails to complete the Works by the 'Date of Completion' stated in the Appendix or within any extended time under Clause 43 hereof and the S.O. certifies in writing that in his opinion the same ought reasonably so to have been completed the Contractor shall pay or allow the Government a sum calculated at the rate stated in the Appendix as Liquidated and Ascertained Damages for the period during which the said Works shall so remain and have remained incomplete and the S.O. may deduct such damages from any monies due to the Contractor. The certificate issued under this Condition shall be referred to as the 'Certificate of Non-completion'.

Clause 40(b) is also relevant and it reads thus:

> The Liquidated and Ascertained Damages stated in the Appendix hereto, is to be deemed as agreed by the parties hereto, to be the pre-estimate of the loss which the Employer will suffer in the event that the Contractor is in breach of the clause hereof and the Contractor is deemed by entering into this contract to have agreed to pay to the Employer the said amount(s) if the same became due.

[19] With regard the submission of counsel for the defendant on the application of cl 41 of the conditions of contract and cl 41 of the appendix to the conditions of contract in cases of sectional completion, is to be noted that cl 41 of the conditions of contract says, 'Where different completion dates for different sections or parts of the Works are stated and identified in the Appendix … and different and separate Liquidated and Ascertained Damages are provided for each section or part of the Works, *the provisions of this Contract in regard to* the Certificate of Practical Completion, Delay and Extension of Time, *Liquidated and Ascertained Damages for delay*, … *shall*, in the absence of any express provision to the contrary elsewhere in the Contract Documents *apply mutatis mutandis* as if each such section or part was the subject of a separate and distinct contract between the Government and the Contractor'. (Emphasis added.) To my mind, the reference to 'the provisions of this contract

in regard to Liquidated Ascertained Damages for delay' can only be a reference to cl 40(a) of the conditions of contract as reproduced above. What this means is that even in relation to sectional completion of the works as provided for in both cll 41 of the conditions of contract and the appendix, the applicable provision with regard to imposition of LAD for delay is still cl 40(a) of the conditions of contract.

[20] The matter of both cll 41 having been put in context, we can now go back to cl 40(a) and (b) of the conditions of contract to construe the meaning. We will start with sub-cl (b). It states the agreement of the parties that the LAD as stated in the appendix is to be deemed the pre-estimate of the loss which the defendant will suffer in the event the plaintiff is in breach of cl 40. Further, the plaintiff is deemed by entering into the contract to have agreed to pay to the defendant the said LAD if the same became due. It is noteworthy that here the parties are saying that the LAD will only arise in the event the plaintiff is in breach of cl 40. Under what circumstances will the plaintiff be considered to be in breach of cl 40? For this we have to look to sub-cl (a). It says that if the plaintiff fails to complete the works by the date of completion stated in the appendix or within any extended time under cl 43 and the SO certifies in writing that in his opinion the same ought reasonably so to have been completed the plaintiff shall pay or allow the defendant a sum calculated at the rate stated in the appendix as LAD for the period during which the said works shall so remain and have remained incomplete and the SO may deduct such damages from the monies due to the plaintiff.

[21] In my opinion the language of sub-cl (a) is unambiguous and clear, as such, the plain meaning of the words used must be given effect. The provisions are clear that the only instances where the plaintiff is liable to pay LAD are as follows:

(a) if the plaintiff fails to complete the works by the date of completion stated in the appendix, or

(b) within any extended time under cl 43 of the conditions of contract, and

(c) the SO certifies in writing that in his opinion the same ought reasonably so to have been completed.

We will now examine conditions (a) and (b) above and determine whether the plaintiff has breached them. The word 'or' is used and that provides and alternative between condition (a) and (b). That means that the plaintiff can be in breach of either one. By condition (a), before the plaintiff is liable to pay LAD he must have failed to complete the works by the date of completion stated in the appendix. As we have earlier seen, the original date of completion stated in the appendix was 19 March 2003. However, and this is common

ground, the date of completion was extended three times pursuant to cl 43 of the conditions of contract. That being the case, condition (a) becomes irrelevant as the plaintiff by virtue of the three extensions of time given under cl 43 automatically comes within the purview of condition (b). By condition (b) the plaintiff is liable to pay LAD if it has failed to complete the works within the extended time given under cl 43 of the conditions of contract. It is common ground that the plaintiff was given final extension of time to 13 April 2004 to complete the work. Further, we all know that the plaintiff has completed the works on or by 13 April 2004. This is an agreed fact. Hence, there was no question of the plaintiff having been in breach of condition (b) either.

[22] We now come to condition (c) as stated above. The conjunction 'and' is used and it denotes that the condition is in addition to either condition (a) or (b) that precedes it. The thing to say is that there is no evidence that the SO had at any time issued such a certificate of non-completion contemplated by cl 40(a). I would not be surprised if there is none because quite obviously it would have been impossible for the SO to have issued such a certificate given that the plaintiff was not in breach of cl 40(a).

[23] It is quite clear then that the plaintiff was not in breach of cl 40(a) as the project was completed within the extended time given under cl 43. In any case, the SO had not issued any certificate of non-completion as contemplated under cl 40(a). That being the case the SO had no basis whatsoever under the provisions of the contract to impose LAD on the plaintiff and the more so when it was imposed, as in this case, to run after the date the plaintiff had completed the project within time. In amplification of this view that I take I will refer to the further provisions of cl 40(a) pertaining to the amount of LAD to be calculated in the event that the plaintiff was found to have breached the clause. It is provided that upon the SO issuing his certificate of non-completion the plaintiff becomes liable to pay 'a sum calculated at the rate stated in the Appendix as Liquidated and Ascertained Damages *for the period during which the said Works shall so remain and have remained incomplete*'. (Emphasis added.) The period contemplated here in which LAD can be imposed is still the period 'during which the said works shall so remain and have remained incomplete'. At the risk of being repetitive, we all know that the plaintiff had completed the works by 13 April 2004 and it could not have been that from 14 April 2004 to 27 September 2004 that the works were and had remained incomplete.

[24] Now to the reliance by the defendant on cl 39 of the Prelim & Gen to justify the deduction for LAD. Even if I were to accept the submission of counsel that the date of completion envisaged by cl 39 of the Prelim & Gen

includes the issuance of the CFO, that in my view will still not assist the case of the defendant. As has been explained earlier, there is specific provision in the contract for the imposing of LAD and that specific provision is cl 40 (a) of the conditions of contract. As we have seen, the first condition of cl 40(a) is that the plaintiff must have failed 'to complete the works by the date of completion stated in the Appendix'. The defendant's case is that by virtue of cl 39 of the Prelim & Gen the date of completion as stated in the appendix is to be equated with the date of the issuance of the CFO, which is 27 September 2004. If we were to go with the stance taken by the defendant that 27 September 2004 is to be reckoned as the date of completion, in the context of cl 40(a) this will translate to asking the question, 'Did the plaintiff fail to complete the works by 27 September 2004?' The answer to that of course has to be a resounding 'No' and this is because it is common ground that the plaintiff completed the works on 13 April 2004. So even if we go along with the case for the defendant that the completion date is 27 September 2004, the plaintiff was still not guilty of any breach as contemplated by cl 40(a). A fortiori, the SO did not have any basis in contract to impose LAD from 14 April 2004 to 27 September 2004.

[25] The defendant has raised the point that the plaintiff has not challenged the interim payment certificates No 23 and No 24 on any of the five grounds stated by Chow Kok Fong in his book *Law and Practice of Construction of Contracts*, (3rd Ed), Sweet & Maxwell Asia, 2004 at pp 352–353. As well the defendant contends that the plaintiff cannot resile from the contract that has allowed the deduction for LAD on grounds that the terms are harsh or unreasonable. The answer to these contentions is simply that the finding of the court that the SO has no basis in contract to impose the LAD for the period 14 April 2004 to 27 September 2004 should put paid to them.

CONCLUSION

[26] Following from what has been said above, my answer to the question of law stated by the parties is that upon a proper construction of the contract the deduction of the sum of RM668,000 for LAD for the period 14 April 2004 to 27 September 2004 in Interim Certificates Nos 23 and 24 is without basis and therefore unlawful. The imposition of the LAD being unlawful, the deduction in the interim payment certificates No 23 and No 24 of the sum of RM668,000 from the contract sum due to the plaintiff was wrongly made. The plaintiff therefore succeeds in its claim and I accordingly enter judgment for the

plaintiff in the sum of RM668,000 with interest at 8%pa from date of judgment until satisfaction and costs of the action to be taxed unless agreed.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed